Operating Engineers Local 3, AFL–CIO *and* Oskins Electric Co., Inc. Case 37–CD–53

August 10, 1992

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed by International Brotherhood of Electrical Workers Local 1186, AFL–CIO, alleging that the Respondent, Operating Engineers Local 3, AFL–CIO, violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing the Employer to assign certain work to employees the Respondent represents rather than to employees represented by IBEW Local 1186. The hearing was held February 20, 1992, before Hearing Officer Thomas W. Cestare.

The National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer, a Hawaii corporation, is an electrical contractor at construction sites throughout the State of Hawaii, where it annually purchases and receives goods and materials in excess of $50,000 from wholesale suppliers who directly received these items from points outside the State of Hawaii. The parties stipulate, and we find, that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that Operating Engineers Local 3 and IBEW Local 1186 are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. *Background and Facts of Dispute*

Since 1989 the Employer has been engaged in ongoing work under a contract to install electric and communication lines at a construction site known as the South Kohala Resorts project. As part of this work, known as ''outside'' work,[1] employees must operate backhoes and other excavation equipment to dig the trenches for the underground lines. The Employer has used IBEW Local 1186-represented employees or employees referred through Local 1186's hiring hall,[2] to operate the excavation equipment.

On July 16, 1991, Maitland Akau, business agent for Operating Engineers Local 3, contacted the Employer and Goodfellow Brothers, the general contractor, and claimed the work of operating the excavation equipment for employees represented by Local 3. On that day, and nearly every day until early August, Akau told the Employer or Goodfellow's project manager that he would put up a picket line and ''shut down the job'' by pulling members of Local 3 off the South Kohala Resorts project unless employees represented by Operating Engineers Local 3 were assigned the disputed work.

On August 2, Akau reiterated his threat to ''shut down the job.'' In order to avert the threatened strike, the Employer's president, Jack Oskins, agreed to hire two employees represented by Local 3 through the Local 3 hiring hall to perform the excavation work. At the time of the hearing, the Employer's subcontract was approximately 90 percent complete, with full completion scheduled for April 1992. Employees represented by Operating Engineers Local 3 have performed the disputed work since August.

B. *Work in Dispute*

This disputed work involves the operation of equipment which is used to perform the excavating function for underground electrical installation at the Goodfellow worksite at South Kohala Resorts on the Island of Hawaii, State of Hawaii.

C. *Contentions of the Parties*

Operating Engineers Local 3 did not participate in the 10(k) hearing. Rather, minutes before the start of the hearing, Local 3 filed by facsimile transmission, a document entitled ''Disclaimer''[3] and moved to quash the hearing. The hearing officer accepted the documents but denied the motion to quash, reserving the issue for the Board.[4]

[1] ''Outside work'' is the work involved in bringing electricity to within 5 feet of a building. ''Inside work'' encompasses all electrial work inside and within 5 feet of a building.

[2] There is an agreement between Local 1186 and Local 3 under which Local 1186 agreed to refer Local 3 operators to operate heavy excavation equipment if Local 1186 operators were unavailable. There is no evidence that the Employer was a party to this agreement; but, on occasion, the Employer has employed Local 3 operators referred by Local 1186.

[3] The disclaimer states:

> Operating Engineers Local Union No. 3 hereby disclaims the work of the operation of equipment which performs the excavating function for underground electrical installation for Oskins Electric at the Goodfellows' jobsite on the island [sic] of Hawaii.

[4] On March 5, 1992, Operating Engineers Local 3 filed a brief in support of motion to quash and against broad order. On March 18, the Employer's reply brief in opposition to Operating Engineers Local 3, AFL–CIO brief in support of motion to quash and against broad order was rejected by the Executive Secretary. The Employer's brief later was received after reconsideration by the Executive Secretary. On March 30, Operating Engineers Local 3 filed an oppo-

The Employer and Local 1186 argue that Local 3's purported disclaimer is untimely and a sham designed to avoid an authoritative ruling on the merits of the dispute. The Employer asserts that more than 90 percent of the Employer's work has been completed and that, since early August, the Employer has allowed Local 3-represented employees referred by Local 3 to perform the work, in order to avoid a threatened work stoppage. The Employer also argues that the purported disclaimer is not co-extensive with the work in dispute because it disclaims only the work at the South Kohala Resorts project. The Employer argues that Local 3 claims the disputed work not only at the South Kohala Resorts project but at all the Employer's present and future projects.

As to the merits of the dispute, the Employer and IBEW Local 1186 contend that employees represented by Local 1186, or referred from its hiring hall, are entitled to perform the disputed work by virtue of the collective-bargaining agreement between them. The Employer and Local 1186 also contend that the Employer's practice has been to use IBEW Local 1186-represented employees to perform the disputed work and that it clearly prefers them for reasons of economy, efficiency, and safety. The Employer also argues that the Board's award of the disputed work should cover all the Employer's jobsites and not be confined to the South Kohala Resorts project because Akau's statement that ''We can't allow you to continue growing'' without Local 3 operators and statements made during settlement negotiations[5] imply that his threats extend beyond the South Kohala Resorts site. Local 3 contends that, if its motion to quash the hearing is denied, the Board should confine its award of the disputed work to the South Kohala Resorts project.

D. *Applicability of the Statute*

Although it is well settled that an effective renunciation of work in dispute dissolves a jurisdictional dispute,[6] the Board will refuse to give effect to ''hollow disclaimers'' interposed for the purpose of avoiding an authoritative decision on the merits.[7] We find that Local 3's 11th-hour disclaimer is a hollow disclaimer in view of the fact that, at the time of the hearing, the disputed work was 90 percent complete and, since August 1991, it had been performed by employees represented by Local 3. In short, there was nothing left for Local 3 to disclaim. See *Carpenters Local 56 (Jeremiah Sullivan Sons)*, 269 NLRB 98, 99 (1984); *Plumbers Local 703 (Airco Carbon)*, 261 NLRB 1122, 1124 (1982). Accordingly, we find that Local 3's purported disclaimer is ineffective, and we deny its motion to quash the 10(k) hearing.

As to whether a dispute exists, the record contains uncontradicted testimony that Local 3's business agent Akau threatened that if the Employer did not replace Local 1186-represented employees with Local 3-represented employees to perform the disputed work, he would ''pull [all Local 3 members] off the job,'' virtually shutting down the project, and that, as a result of these threats, made daily over the course of a 2- to 3-week period from July 16 through early August, the Employer hired employees represented by Local 3 to perform the disputed work.

We find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

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sition to the employer's motion for reconsideration and on March 31 it filed a motion to strike the reply.

The Board's Rules and Regulations Sec. 102.90 provide that no reply brief shall be filed except on special leave of the Board. We regard the Employer's motion for reconsideration as an adequate request for leave to file and we accept the Employer's brief as a brief in opposition to the Operating Engineers' motion to quash. It is appropriate for the Employer to address factual arguments made by Local 3 for the first time in its posthearing brief, which was submitted pursuant to a simultaneous-filing schedule for all parties. Accordingly, we deny Operating Engineers Local 3's motion to strike it as a reply brief.

Member Raudabaugh would grant Local 3's motion to strike the employer's reply brief. He notes that receipt of the brief is contrary to the provisions of Rule 102.90. Under that rule, a reply brief may be accepted only if special leave to file same is requested and granted. In the instant case, there was no such request, and thus the brief was properly rejected. Similarly, the motion for reconsideration of that rejection should be denied. Instead, the majority, somewhat miraculously, converts the motion for reconsideration into an original request for leave to file the brief, and the majority then granted the request. In Member Raudabaugh's view, the majority has effectively nullified the rule. In addition, he notes that all issues raised in the reply were ripe for discussion at, and immediately after, the hearing. In fact, the employer's posthearing brief raises these issues. In these circumstances, Member Raudabaugh would not ignore the rule and thus would not accept the reply brief.

[5] In making our determination, we do not rely on testimony relating to the substance of settlement negotiations.

[6] *General Building Laborers (Georgia-Pacific)*, 209 NLRB 611, 612 (1974); *Sheet Metal Workers Local 55 (Gilbert L. Phillips)*, 213 NLRB 479, 480–481 (1974).

[7] See *Mine Workers (Con-Serv)*, 299 NLRB 865, 868 (1990); *Plasterers Local 502 (Advance Terrazzo)*, 272 NLRB 810, 811 (1984); *Laborers Local 910 (Brockway Glass)*, 226 NLRB 142, 143 (1976).

The following factors are relevant in making the determination of the dispute.

1. Collective-bargaining agreements

The Employer has had successive collective-bargaining agreements with Local 1186 since 1976.[8] The current collective-bargaining agreement, extended by mutual agreement until 1995, provides that the ''Employees covered by this agreement shall do all electrical construction, erection, installation, handling, and moving work on the job site'' and requires that the Employer obtain all its employees, including ''heavy equipment operators'' who perform the disputed work, through the Local 1186 hiring hall. The Employer is not a party to a collective-bargaining agreement with Operating Engineers Local 3. We therefore find that the factor of collective-bargaining agreements favors an award of the work in dispute to employees represented by IBEW Local 1186.

2. Employer preference and past practice

The Employer's president, Jack Oskins, testified that it has been the Employer's preference to assign the disputed work to IBEW Local 1186 members or employees referred through Local 1186's hiring hall and that it is the Employer's preference to continue to do so. Accordingly, we find that the Employer's preference and past practice favor awarding the disputed work to employees represented by IBEW Local 1186.

3. Area practice

The record discloses that, in 1972, Local 3 and Local 1186 entered into an agreement that Local 1186 would refer employees represented by Local 3 to jobs requiring operation of excavation equipment. As part of that agreement, heavy equipment operators who were members of Local 1186 were ''grandfathered'' and were thus exempt from the agreement. The record does not disclose evidence from which we can determine the number of ''grandfathered'' Local 1186 members, and there is some evidence that this agreement was in the process of being renegotiated between the two unions. Accordingly, we find that this factor does not favor an award to employees represented by either union.

4. Relative skills

It is undisputed that Local 1186-represented employees are cross-trained not only to operate the excavation equipment but also to perform other functions incident to the electrical installation. There also is no dispute that employees represented by Local 3 are not trained in electrical installation. On the other hand, it is undisputed that employees represented by Local 3 have the skills necessary to operate the excavation equipment, the specific work at issue. It is therefore immaterial that the Local 3-represented employees are not trained in other facets of electrical installation. Indeed, Oskins testified that he has used Local 3-represented employees, referred by Local 1186, to perform the disputed work and employees represented by Local 3 have performed the work since August. Accordingly, we find that this factor does not favor an award to employees represented by either union.

5. Economy and efficiency of operations

Notwithstanding our above finding that the relative skills of employees represented by Local 3 and Local 1186 do not favor an award to employees represented by either union, Oskins testified without contradiction that IBEW Local 1186-represented employees are more versatile than Local 3-represented employees because they are trained not only to operate the excavation equipment, but to perform some of the electrical installation work as well. Accordingly, this factor favors an award of the disputed work to employees represented by IBEW Local 1186.

Conclusions

After considering all the relevant factors, we conclude that employees represented by IBEW Local 1186 are entitled to perform the work in the dispute. We reach this conclusion relying on collective-bargaining agreements, employer preference and past practice, and economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by International Brotherhood of Electrical Workers, Local 1186, AFL–CIO, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding at the South Kohala Resorts project.[9]

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Oskins Electric Co., Inc. represented by International Brotherhood of Electrical Workers, Local 1186, AFL–CIO are entitled to operate the equipment which performs the excavating function for underground electrical installation at the Goodfellow worksite at South Kohala Resorts on the Island of Hawaii, State of Hawaii.

[8] The Employer is signatory to the Inside Agreement, which requires it to abide by the terms of the Outside Agreement in the installation of underground duct work.

[9] Accordingly, we deny the Employer's and Local 1186's request that this award apply to the operation of heavy equipment used in the installation of electrical material by Oskins Electric in perpetuity or, in the alternative, during the term of the existing collective-bargaining agreement, as there is not enough probative evidence on the record before us to justify a broad order at this time.

2. Operating Engineers Local 3, AFL–CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Oskins Electric Co., Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Operating Engineers Local 3, AFL–CIO shall notify the Officer-in-Charge for Subregion 37 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with the determination.